NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0012
	)	
DENNIS VAN SKY,	)	DECISION ON RECONSIDERATION
Appellant	)	
	)	February 28, 2000
_____	)	

STATEMENT OF THE CASE

This Office issued a Decision in this appeal on August 9, 1999. The Decision concluded that the Restricted Access Management [RAM] program incorrectly deprived Mr. Van Sky of a 1995 Individual Fishing Quota [IFQ] permit under the Pacific halibut and sablefish Individual Fishing Quota program. The Decision vacated RAM's initial administrative determination [IAD] of Mr. Van Sky's application for quota shares [QS], insofar as it denied him the issuance of the 1995 permit, and ordered RAM to adjust Mr. Van Sky's IFQ account for regulatory area 3A for the 2000 halibut fishing season by including an additional amount equal to the IFQ he should have received in 1995. The order specified that this additional amount should be based on an initial issuance of 27,900 units of halibut QS that were awarded to Mr. Van Sky on January 31, 1995.

On August 19, 1999, RAM filed with this Office a timely Request for Reconsideration of the Decision. I granted the motion the same day and stayed the effective date of the Decision. An oral hearing was held in Juneau on August 23-24, 1999. As requested in the hearing order, the RAM Program Administrator and two RAM staff members testified at the hearing. Mr. Van Sky did not attend the hearing, either in person or via telephone.

Following the hearing, I granted RAM's request for a 30-day period in which to amend the Request for Reconsideration. After a further extension, RAM submitted a revised Request for Reconsideration on October 1, 1999. Because there is now sufficient information to render a Decision on Reconsideration on the record and because all procedural requirements have been met, I hereby close the record in this appeal. [50 C.F.R. § 679.43(k)]

ISSUES

1. Did the Decision incorrectly state the amount of quota share units initially issued to Mr. Van Sky in 1995?

2. Did the Office of Administrative Appeals (OAA) lack the authority to call RAM staff to appear as witnesses at the August 23, 1999 hearing?

3. Did the OAA abuse its discretion by inquiring about certain RAM polices and procedures at the hearing?

4. Was Conclusion of Law number 1 erroneous?

5. Was Conclusion of Law number 2 erroneous?

6. May OAA review RAM's implementation policy decisions?

DISCUSSION

1. Did the Decision incorrectly state the amount of quota share units initially issued to Mr. Van Sky in 1995?

In its Request for Reconsideration, RAM says that there is an error of fact in the Disposition and Order section of the Decision, namely, the statement that on January 31, 1995, Mr. Van Sky was initially issued 27,900 units of halibut quota shares. RAM says that the weight of the evidence in the record shows that the correct figure is 6,598. My review of the record on reconsideration supports RAM's assertion.

Mr. Van Sky's Application for Quota Share, Part 3, signed by him on June 4, 1994, shows the total qualifying pounds of halibut — which form the basis for the amount of QS — to be 6,598. Likewise, the Quota Share Data Summary, dated April 28, 1995, shows 6,598 qualifying pounds of halibut for Mr. Van Sky. Further, an "access query" of the 1995 IFQ archive records by Tracy Buck, added to the record on August 26, 1999, after the oral hearing, shows that 6,598 units of halibut QS were assigned to Mr. Van Sky's IFQ identification number as of January 30 or 31, 1996. [Exhibit 9] All of these documents support the 6,598-unit figure.

The figure of 27,900 units that appeared in the Disposition and Order section of the Decision came from the IFQ590 screen from RAM's Official IFQ Record, printed out as Exhibit 2 and supplied to this Office by RAM during the first week of August 1999. At that time, Jessica Gharrett, the RAM Program Data Manager, explained to me that this document showed that Mr. Van Sky was awarded 27,900 units of halibut QS on January 31, 1995. During the August 23 hearing, Ms. Gharrett testified that her current understanding — different from what she understood when the printout was supplied — is that the 27,900-unit figure on the IFQ590 screen actually represents the number of units Mr. Van Sky currently holds in a block. She stated at the hearing that this number includes both the amount of QS units assigned to Mr. Van Sky's IFQ ID number on January 31, 1995, as well as amounts of QS added later. [Hearing transcript, at 39-40]

Tracy Buck, RAM's Permit Operations Manager, testified that a halibut QS certificate was printed for Mr. Van Sky's IFQ ID number on February 1, 1995, and that the amount of QS units on the certificate

would have been based on the information on record with RAM as of noon on January 31, 1995. [Hearing transcript, at 6-8] She also testified that 27,900 units of halibut QS shown on Exhibit 2 were not all awarded on January 31, 1995. [Hearing transcript, at 34] Ms. Buck stated that the figure of 27,900 units included three additional groups of QS that were transferred to Mr. Van Sky in 1995 and 1996, and "swept up" (combined) with his original initial issuance in October 1996 and January 1997. [Hearing transcript, at 36] These three transfers total 21,302 units of QS. [Exhibit 8] Subtracting that amount from 27,900 leaves a remainder of 6,598 units. Ms. Buck testified that she would conclude that that was the amount of QS units on record for Mr. Van Sky as of January 31, 1995. [Hearing transcript, at 38]

Phil Smith, RAM Program Administrator, testified that his "new understanding . . . is that the 27,900 represents the amount of units of quota share in the block that started out with a certain serial number as of January 31, 1995 and it also represents subsequent amounts of quota share that have been swept up within that same block . . .." [Hearing transcript, at 66-67]

Based on my review of the entire record, including the testimony and exhibits added during and after the August 23-24 oral hearing, I find by a preponderance of the evidence that the amount of halibut QS units on record for Mr. Van Sky as of noon on January 31, 1995 was 6,598 units. Therefore, I find that 6,598 units is the figure that RAM should use to determine the additional amount of IFQ that should be added to Mr. Van Sky's 2000 IFQ account for regulatory area 3A. RAM says that it does not object to issuing additional IFQ to Mr. Van Sky's 2000 IFQ account based on this corrected QS figure. [Revised Request for Reconsideration, at 5]

2. Did the Office of Administrative Appeals (OAA) lack the authority to call RAM staff to appear as witnesses at the August 23, 1999 hearing?

In the Revised Request for Reconsideration, RAM argues that this Office lacked authority in the regulations to order RAM staff to appear and testify at the August 23, 1999, oral hearing. RAM argues that because this Office does not have subpoena authority, the hearing order was without legal authority. RAM really is raising two separate issues. The first asks whether OAA has the regulatory authority to order a hearing and call and question witnesses, and whether that applies to RAM staff members. The second issue is whether OAA has the legal authority to compel the attendance of witnesses at a hearing.

The appeals regulations clearly authorize this Office to order hearings and to call and question witnesses. Under 50 C.F.R. § 679.43(g)(3), an Appeals Officer has discretionary authority to order that a hearing be conducted. Regulation 50 C.F.R. § 679.43(n) expressly authorizes an Appeals Officer to order an oral hearing after determining "that the issues to be resolved at hearing can best be resolved through the oral hearing process." Regulation 50 C.F.R. § 679.43(i) gives an Appeals Officer general authority to call and question witnesses and to administer oaths.
OAA's express regulatory authority is bolstered by the judicially recognized duty of administrative

judges to develop the facts of a case and to assist parties in developing a complete record, especially where the party is not represented by legal counsel.[1] This duty is embodied in 50 C.F.R. § 679.43(k), which provides that the Appeals Officer shall close the record and issue a decision in a case only "after determining there is sufficient information to render a decision on the record of the proceedings." Furthermore, as a matter of due process, this Office implicitly has the right to obtain all information in RAM's possession that is part of the record of a case or that was relied on by RAM in making its determination on an application. It is also proper during a hearing for the Appeals Officer to ask appropriate RAM staff members to clarify the meaning of documents, data, or information that is not clear on its face.

The regulations under which this Office operates do not exempt RAM staff members from being called as witnesses. Where their testimony is needed to complete the record, they arguably have a duty to appear and testify. In this case, it was apparent that the three RAM staff members had differing understandings of the significance of information in RAM's databases concerning Mr. Van Sky's QS and IFQ accounts.[2] Additionally, RAM's policy and procedures for handling applications that lacked executed waivers needed to be documented for the record because they had never been published. Therefore, in my judgment, the testimony of the three RAM staff members was both necessary and appropriate, and I determined that an oral hearing was the most efficient and effective way to obtain this testimony. Thus, I conclude that calling the RAM staff members as witnesses was fully authorized by the appeals regulations and the Appeals Officer's duty to develop a complete record.

The second issue — whether OAA can compel a witness to appear and testify at a hearing — is a different question, one which does not affect OAA's legal authority to order a hearing and call RAM staff members as witnesses. The United States Court of Appeals for the Ninth Circuit, in its memorandum decision in Dell, et al. v. Department of Commerce, et al., D.C. No. CV-96-00613-JCC (August 11, 1999), affirmed the District Court's determination that the Due Process Clause does not require the provision of compulsory process as a part of the administrative adjudication of IFQ applications. The question of what actions an Appeals Officer can take if a witness refuses to appear at

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[1] *See, e.g.,* Walker v. Heckler, 588 F. Supp. 819, 824 (S.D.N.Y. 1984): "[T]he ALJ has a duty to develop the facts fully and fairly, and must 'affirmatively assist the parties in developing the record.' The ALJ's duties are heightened when a claimant is pro se, but exist even when a claimant is represented by counsel." *See also*, Lashley v. Secretary. of Health and Human Services, 708 F.2d 1048 (6th Cir. 1983) regarding the duty of the administrative law judge to fully develop the record; Smith v. Harris, 644 F.2d 985 (3d Cir. 1981): "Particularly where the claimant is unrepresented by counsel, the ALJ has a duty to exercise 'a heightened level of care' and 'assume a more active role'."

[2] As late as the afternoon of August 18, 1999, the day before the Request for Reconsideration was filed, it appears that two of the three RAM witnesses did not understand why the RAM computer system was showing that Mr. Van Sky had 27,900 units of QS with an "awarded" date of January 31, 1995. *See,* E-mail memoranda between Phil Smith, Jessica Gharrett, and Tracy Buck, August 18-19, 1999. [Exhibit 10]

a hearing or if a party refuses to produce evidence in its possession goes beyond the scope of issues raised by this appeal.

Perhaps RAM's concern is actually with the wording of the hearing order. The order stated: "The following witnesses shall appear in the following order [sequence], when called." Then the three RAM staff members were listed by name. That is the kind of language this Office uses to call witnesses. The hearing order is not a subpoena. An order is used because that is the device specified in the appeals regulations.

It is not clear why RAM is questioning the legitimacy and enforceability of the order. RAM staff members voluntarily complied, as we expect them to do since RAM is a coordinate office in the NMFS Alaska Region and since the region has a long-standing policy of intra-office cooperation. Contrary to RAM's assertions in the Revised Request for Reconsideration, the staff members in question were consulted about their availability before the hearing order was issued, and the timing of the hearing was adjusted to meet the scheduling needs of the RAM Program Administrator.

This Office has used its authority to call RAM staff members as witnesses sparingly, not abusively. In the five years in which the OAA appeals process has been in existence, we have called RAM staff members as witnesses only twice. The first time was on June 30, 1995, in Scott Gilbert, Appeal No. 95-0016. On that occasion Tracy Buck testified, without objection, about RAM's practices and procedures in handling IFQ applications. While we are aware that RAM staff members have other obligations, the overall time they have spent testifying at our administrative hearings has been minimal. We trust that RAM will continue to cooperate with our administration of the appeals process as they have in the past.

3. Did the OAA abuse its discretion by inquiring about certain RAM polices and procedures at the hearing?

The hearing order in this appeal listed three issues to be addressed at the oral hearing. Among them was:

> 3. RAM's policies and procedures for handling IFQ applications in cases in which the applicant has failed or refused to execute the waiver of confidentiality of fishing history on the applicant's Request for Application for QS forms.

RAM asserts that OAA abused its "regulatory discretion" by addressing this issue at the hearing. As authority in support of its position, RAM cites 50 C.F.R. § 679.43(g)(3)(i), which states that an Appeals Officer has discretion to order a hearing only if, among other things, there is a genuine and substantial issue of adjudicative fact for resolution at the hearing. The regulation expressly provides that "A hearing will not be ordered on issues of policy or law."

The focus of 50 C.F.R. § 679.43(g)(3)(i) is that hearings are to be ordered to make findings regarding disputed facts, rather than merely as a forum for appellants to voice complaints about the wisdom or validity of policies or law.[3] We do not read this regulation as barring a hearing to determine the *facts* of what RAM's unwritten policies and procedures are. Therefore, I conclude that this Office did not abuse its discretion by inquiring about RAM policies and procedures at the hearing.

4. Was Conclusion of Law number 1 erroneous?

Conclusion of Law #1 in the Decision reads:

> 1. RAM's failure to issue and mail the IFQ permit, after determining that Mr. Van Sky was qualified for an initial issuance of QS and that his application was complete, was in violation of 50 C.F.R. § 679.40(c)(3).

The gist of this conclusion is that *even after RAM determined that Mr. Van Sky's application was complete,* RAM refused to mail a 1995 IFQ permit to Mr. Van Sky before the start of the 1995 halibut fishing season, as required by 50 C.F.R. § 679.40(c)(3). RAM was apparently operating under the mistaken belief that Mr. Van Sky's QS had been excluded from the 1995 IFQ pool,[4] but that does not excuse RAM's noncompliance with the regulation.

None of RAM's objections to Conclusion of Law #1 specify why it believes the conclusion was in error. Therefore, I find that RAM's objections are without merit. They appear to relate only to Conclusion of Law #2 and, therefore, will be discussed under the next issue heading. Upon review, however, I did find an error in Conclusion of Law #1, namely, I used the current citation to the regulation, rather than the citation that was in effect at the time RAM was considering Mr. Van Sky's application. The correct citation is former 50 C.F.R. § 676.20(f)(3).[5] I conclude that, except for the erroneous citation, Conclusion of Law #1 is not in error.

5. Was Conclusion of Law number 2 erroneous?

Conclusion of Law #2 states:

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[3]This view is supported by language in the preamble to the proposed rule for the IFQ program: "The [North Pacific Fishery Management] Council did not intend to involve the appeals process with, for example, questions about whether the IFQ program . . . is good fishery management policy . . .." 57 Fed. Reg. 57,135 (1992).

[4]RAM now concedes that Mr. Van Sky's QS units were included in the QS pool on January 31, 1995. [Revised Request for Reconsideration, at 5]

[5]All IFQ regulations were renumbered, effective July 1, 1996. *See,* 61 Fed. Reg. 31,270 (1996).

2. 50 C.F.R. § 679.4(a)(1)(ii) and 50 C.F.R. § 676.20(d) did not authorize RAM to deny or delay issuance of QS or an IFQ permit to a qualified applicant, such as Mr. Van Sky, whose confidentiality waiver is not, in fact, needed, and whose application and RFA are, in all other respects, complete.

The first regulation cited in the conclusion of law, 50 C.F.R. § 679.4(a)(1)(ii), was actually not in effect at the time RAM was considering Mr. Van Sky's QS application. Therefore, that regulation is irrelevant to this appeal. The second regulation, former 50 C.F.R. § 676.20(d), provided, in part, that "An incomplete application will be returned to the applicant with specific kinds of information identified that are necessary to make it complete." This regulation, in effect, authorized RAM to delay approval of an application that it deemed "incomplete." RAM implicitly has discretionary authority to determine what constitutes a complete application.

RAM contends that Conclusion of Law #2 is in error because RAM's policy was to consider any QS application to be incomplete if the applicant did not execute a waiver of confidentiality of the applicant's fishing history records. The waiver appeared on the Request for Application for Quota Share (RFA) forms. RAM argues that its policy of requiring the waiver was approved by the NMFS Alaska Regional Administrator and by NOAA General Counsel, and that the policy was rationally related to, and necessary for, implementation of the IFQ program.

RAM required the waiver of all applicants without exception and without regard to the facts of each applicant's situation. RAM treated the requirement as if it was binding on both applicants and RAM itself, i.e., as if RAM had no discretion regarding the waiver. The policy, as applied, had the effect of imposing a new substantive requirement for obtaining QS in addition to the requirements in the IFQ final rule. Thus, RAM treated its policy as if it were a regulation or legislative rule having the force of law. Under the Administrative Procedure Act [5 U.S.C.
§ 553], however, a legislative rule is valid and has the force of law only if it has been promulgated through proper rulemaking procedures. Except in specified circumstances, which are not present here, the APA requires "notice and comment" rulemaking. Essentially, this entails advance publication of the proposed rule in the Federal Register and a period during which the public is invited to review and comment on the proposal.[6] Only after those steps are completed and a final rule is published can the rule take effect and become enforceable.

RAM's waiver requirement policy was never published, let alone published in the Federal Register. The instructions that accompanied the RFA forms did not explain or even mention the waiver requirement. Quota Share applicants were never publicly given advance notice that executing the

[6]The required public comment period for regulations proposed under the Magnuson-Stevens Act is 15 to 60 days after the proposed rule has been published in the Federal Register. [16 U.S.C. § 1854(b)]

waiver was a requirement or condition for obtaining QS and an IFQ permit.[7] The public was never given an opportunity to review and comment on the requirement before RAM put it into effect. The APA rulemaking procedures were not followed and, therefore, I conclude that the waiver requirement was not a valid or enforceable legislative rule.

When an agency wants its policy to be binding on all applicants without exception, and without considering an individual applicant's circumstances, it must adopt that policy as a regulation. When an agency applies its policy in a particular case, it must be prepared to justify the policy as if it had never been announced.[8] Because RAM's waiver policy was not adopted as part of a regulation, RAM cannot apply the policy blindly to all applicants. When an applicant challenges the policy, RAM must consider the relevant facts of the individual's case and determine whether application of the policy is rational and must justify it in that instance. The failure to do so results in an arbitrary application of the policy and constitutes an abuse of discretion.[9]

In Mr. Van Sky's case, RAM determined that execution of the waiver was necessary and that its absence rendered his Application for QS "incomplete" and "defective." In denying Mr. Van Sky's application, RAM stated that "It is, or should be, obvious that NMFS can not perform its duty to effectively implement the [IFQ] program unless each applicant waives (only for the purpose of program implementation) the confidential nature of those [fish harvest] data." [IAD, at 2] RAM further explained to Mr. Van Sky that the requirement that all applicants execute the waiver is rationally related to the application process and the proper allocation of QS, because it enables RAM to reveal the total qualifying pounds landed by the applicant to the owner or lessee of the vessel from which the pounds were landed. The owner or lessee may then use that information to verify his or her claim to QS. Without the authority to reveal an applicant's harvest data, "implementation of the program would be seriously constrained, if not rendered altogether impossible." [IAD, at 2]

While this may be the general rationale for the waiver policy, there is no evidence in the record that

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[7]Mr. Van Sky was privately informed of the waiver requirement in a letter from RAM, dated January 11, 1994, but only after he objected to executing the waiver. Such individualized notice does not meet the APA notice and comment rulemaking requirements.

[8]*See,* Pacific Gas and Electric Co. v. FPC, 506 F.2d 33 (D.C.Cir. 1974); CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 4.11 (2d ed. 1997). In fact, RAM's waiver policy never was publicly announced to applicants.

[9]Under Sec. 706 of the Administrative Procedure Act [5 U.S.C. § 706(2)(A)], the standard of judicial review of agency decisions is whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In making that inquiry, a court asks whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made. Natural Resources Defense Council v. United States Department of the Interior, 113 F.3d 1121 (C.A.9th 1997).

RAM considered whether it actually needed a waiver from Mr. Van Sky before denying his application. The evidence in the record shows that the only qualifying landings Mr. Van Sky made were from his own vessels. [Exhibit 6, Tracy Buck memorandum, July 22, 1999] No other applicant claimed these qualifying pounds, so no one else needed to see Mr. Van Sky's confidential fish harvest data. Furthermore, under state and federal confidentiality rules RAM did not need a waiver from Mr. Van Sky to reveal his own fish harvest data to him. RAM now concedes that it "may" not have needed Mr. Van Sky's waiver.[10] [Revised Request for Reconsideration, at 4, n. 4]

Nonetheless, RAM insisted that Mr. Van Sky had to execute the waiver to complete his application, and that he could not receive QS and an IFQ permit until he did so. RAM acknowledged that, in all other respects, Mr. Van Sky's RFA and application were complete and had been timely filed. [IAD, at 1-2] Based on data in the NMFS Official IFQ Record at the time of application, which Mr. Van Sky did not dispute, RAM knew that Mr. Van Sky had met all the regulatory requirements to be a "qualified person" and receive an initial issuance of QS and an IFQ permit. Yet, RAM denied Mr. Van Sky's application because the waiver had not been executed.

I find by a preponderance of the evidence that RAM did not need an executed waiver from Mr. Van Sky in order to implement the IFQ program or as a condition for issuing QS and an IFQ permit to him. Therefore, I conclude that the stated rationale for RAM's policy of requiring waivers could not rationally apply to Mr. Van Sky's application. I further conclude that RAM's refusal to issue QS and an IFQ permit to Mr. Van Sky until he executed the waiver was an abuse of discretion and was not authorized by the regulation that allowed RAM to require applicants to complete their QS applications. Therefore, I conclude that Conclusion of Law #2 is not erroneous, except for the reference to 50 C.F.R. § 679.4(a)(1)(ii), which was not in effect at the time RAM was considering Mr. Van Sky's QS application.

I should point out here that even if RAM had needed Mr. Van Sky's waiver, it is questionable whether the waiver RAM ultimately obtained was legally valid. Under common law principles, the waiver of a legal right is invalid if it was not voluntary. In this instance, RAM withheld Mr. Van Sky's QS and IFQ permit in order to get him to execute the waiver. Making Mr. Van Sky choose between maintaining his right to privacy and continuing his livelihood was a Hobson's choice that arguably constituted economic duress sufficient to invalidate the waiver.

RAM downplays the significance of requiring Mr. Van Sky to execute the waiver, writing in the IAD that his refusal "is particularly puzzling because it appears to serve no purpose." [IAD, at 3] Although

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[10]In his testimony, Mr. Smith objected that he could not have concluded, at the time RAM was processing Mr. Van Sky's application, "that there was no purpose in having the waiver signed." [Transcript, at 79] The fact is, however, that by January 31, 1995 (the deadline for placing QS in the pool for IFQ calculations) RAM knew, or could easily have determined, that no other applicants were claiming any of Mr. Van Sky's landings, and that, therefore, RAM did not need his waiver.

RAM apparently didn't think Mr. Van Sky had a significant interest in maintaining his privacy, the Alaska Legislature obviously felt that the privacy of fishing history was important enough to protect it by law. [*See*, ALASKA STAT. § 16.05.815] The irony is that in the name of protecting Mr. Van Sky's legal right to privacy, RAM forced him to waive it.

RAM further complains that this Office did not consider Mr. Van Sky's alleged motivation for refusing to execute the waiver, which RAM speculates was "explicitly designed to frustrate the 'orderly implementation' of the program." [Revised Request for Reconsideration, at 4] An applicant's motivation for refusing to execute a waiver that RAM did not need, and was not authorized to require or even request, is not relevant to the determination of this appeal. Therefore, Mr. Van Sky's motivation was not considered.

6. May OAA review RAM's implementation policy decisions?

The final concern raised in the Revised Request for Reconsideration is that this Office should defer to RAM's "implementation policy decisions" rather than "second-guessing" them. RAM concedes that it is appropriate for OAA to reverse RAM's determinations if, after fully developing the record, the facts show that RAM failed to follow the agency's regulations or policies. On the other hand, RAM contends that its ability to do its job is subverted when OAA questions the appropriateness of RAM's implementation policies, such as the waiver policy.

In support of its argument, RAM cites the Regional Administrator's decision in George M. Ramos, Appeal No. 94-0008, April 21, 1995. In that decision, the Regional Administrator criticized the Appeals Officer's questioning of "the underlying policies behind both the application deadline and the establishment of the QS pool on a one-time basis" under the IFQ program. The Regional Administrator stated that these were:

> policies of the Council and the Secretary of Commerce developed during the long enactment process of this program. This process involved numerous opportunities for public input and comment. More to the point, these "policies" were duly implemented through APA notice and comment rulemaking. As duly implemented regulations, it is wholly inappropriate for an administrative appeals officer to pass judgment on either the validity or the wisdom of such policies. It is for the Council and the Secretary to formulate policy. It is the function of administrative hearings officers to interpret and apply those policies as enacted into regulation: nothing more, and nothing less. [Emphasis and footnotes omitted]

RAM's reliance on Ramos in this appeal is inappropriate. Unlike the situation in Ramos, the policy in question — RAM's waiver policy — was not "duly implemented through APA notice and comment rulemaking." It was not developed by the Council and the Secretary of Commerce "during the long enactment process of this program." It did not involve "numerous opportunities for public input and

comment." It was not a "policy embodied in duly promulgated regulations." Ramos, at 5. To the contrary, RAM sidestepped the entire public participation and APA rulemaking process. Under the name "policy," and without informing applicants, RAM imposed an additional substantive requirement for obtaining quota shares and IFQ permits that was not included in the IFQ regulations. This is clearly not the type of policy that the Regional Administrator addressed in Ramos. Therefore, that decision has no application to this appeal.

In this instance, OAA is not questioning the wisdom of the waiver policy itself. Rather, we are reviewing the manner in which RAM implemented the policy and applied it in a particular case. There are important reasons why this Office must be able to review and determine whether RAM's interpretation and application of regulations and policies in individual cases brought before us was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The most important reason is that, without review by this Office, many applicants would be effectively denied the opportunity to challenge RAM's actions concerning their applications.

The problem was stated eloquently by law Professor Robert A. Anthony, former chairman of the Administrative Conference of the United States:

> Nonlegislative policy documents are often the vehicles by which the agencies establish standards for approving or granting applications submitted by private parties. If the standards are intended to be routinely applied, or if they are regularly applied, they of course have a practical binding effect, even though they are not legally binding. This is true whether the applicant is able to challenge the document in court or not.
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> Frequently the applicant is under some sort of practical compulsion to seek the agency's approval. Guidances or manuals or other nonlegislative documents that set standards for an approval that the applicant must have as a business necessity, for example, or as the means of sustaining livelihood, acquire a particularly potent mandatory force. Where denial would place the applicant in a position of noncompliance with the risk of penalties, or would deprive him of essential sustenance, the standards as a practical matter amount to immediately enforceable regulatory norms — indeed, self-executing ones, because applicants in these circumstances have little choice but to accept the agency's terms. And because these applicants are typically unable to tolerate the delay or cost that a contest would entail, the documents and the norms they establish will often elude judicial scrutiny.

[*Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1340 (1992).]

I conceive such review of RAM's actions in cases brought before us to be our duty as administrative hearing officers and an essential characteristic of a meaningful administrative appeals process. Thus, I

conclude that this Office may review RAM's implementation policy decisions.

Alternative basis for relief

Finally, I note that there is another potential basis for granting relief to Mr. Van Sky independent of the grounds already stated in this decision. It appears that the RFA forms, and the waiver language contained in them, were not authorized collections of information under the Paperwork Reduction Act [44 U.S.C. § 3501 - 3520].[11] Under § 3507 of the Act, federal agencies must submit proposed collections of information, including application forms, for advance approval by the federal Office of Management and Budget (OMB). Evidence of OMB's approval is an assigned control number, which must be printed on the application forms to which the approval applies. If an application form does not display a valid OMB control number, applicants cannot be penalized for failing to provide the information requested on the form. 44 U.S.C. § 3512.

The RFA forms displayed the control number that OMB issued for IFQ program forms, but RAM had not submitted the RFA forms to OMB as part of the review request. [*See* Exhibit 11] As a result, the RFA forms, and the waiver contained in them, had not been approved by OMB, and the OMB control number was not valid for the RFA forms.[12] Therefore, 44 U.S.C.
§ 3512 prohibits RAM from penalizing Mr. Van Sky for failing to execute the waiver that was on the RFA form. Denying Mr. Van Sky's QS application, and refusing to issue QS and an IFQ permit to him until he executed the waiver, constituted an impermissible penalty under the Paperwork Reduction Act. Because the parties have not addressed this issue, however, I do not rely on it as a basis for granting relief to Mr. Van Sky.

FINDINGS OF FACT

1. The amount of halibut QS units on record for Mr. Van Sky as of noon on January 31, 1995 was 6,598 units.

2. The figure that RAM should use to determine the additional amount of IFQ that should be added to Mr. Van Sky's 2000 IFQ account for regulatory area 3A is 6,598 units.

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[11]The version of the Act in effect at the time RAM was considering Mr. Van Sky's application was the Paperwork Reduction Act of 1980 (P.L. 96-511), as amended Paperwork Reduction Act Reauthorization of 1986 (P.L. 99-591). The current version of the Act is the Paperwork Reduction Act of 1995 (P.L. 104-13), which took effect October 1, 1995, almost seven months after RAM issued the Reconsideration IAD.

[12]According to Rick Roberts, NOAA Clearing Officer for PRA review requests, the RFA forms were not submitted and approved until last year.

3. It is proper during a hearing for the Appeals Officer to ask appropriate RAM staff members to clarify the meaning of documents, data, or information that is not clear on its face.

4. The regulations under which this Office operates do not exempt RAM staff members from being called as witnesses.

5. The testimony of the three RAM staff members was both necessary and appropriate, and an oral hearing was the most efficient and effective way to obtain this testimony.

6. The focus of 50 C.F.R. § 679.43(g)(3)(i) is that hearings are to be ordered to make findings regarding disputed facts, rather than merely as a forum for appellants to voice complaints about the wisdom or validity of policies or law.

7. Regulation 50 C.F.R. § 679.43(g)(3)(i) does not bar a hearing to determine the *facts* of what RAM's unwritten policies and procedures are.

8. None of RAM's objections to Conclusion of Law #1 specify why it believes the conclusion was in error. Therefore, RAM's objections are without merit.

9. RAM required the waiver of all applicants without exception and without regard to the facts of each applicant's situation. .

10. RAM treated the requirement as if it was binding on both applicants and RAM itself, i.e., as if RAM had no discretion regarding the waiver.

11. RAM's waiver policy, as applied, had the effect of imposing a new substantive requirement for obtaining QS in addition to the requirements in the IFQ final rule.

12. RAM treated its policy as if it were a regulation or legislative rule having the force of law.

13. RAM's waiver requirement policy was never published.

14. The instructions that accompanied the RFA forms did not explain or even mention the waiver requirement.

15. Quota Share applicants were never publicly given advance notice that executing the waiver was a requirement or condition for obtaining QS and an IFQ permit.

16. The public was never given an opportunity to review and comment on the waiver requirement before RAM put it into effect.

17. RAM did not consider whether it actually needed a waiver from Mr. Van Sky before denying his application.

18. The only qualifying landings Mr. Van Sky made were from his own vessels.

19. No other applicant claimed Mr. Van Sky's qualifying pounds, so no one else needed to see his confidential fish harvest data.

20. Under state and federal confidentiality rules RAM did not need a waiver from Mr. Van Sky to reveal his own fish harvest data to him.

21. RAM did not need an executed waiver from Mr. Van Sky in order to implement the IFQ program or as a condition for issuing QS and an IFQ permit to him.

22. This Office must be able to review and determine whether RAM's interpretation and application of regulations and policies in individual cases brought before us was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

23. Without review by this Office, many applicants would be effectively denied the opportunity to challenge RAM's actions concerning their applications.

24. Review of RAM's actions in cases brought before this Office is our duty as administrative hearing officers and an essential characteristic of a meaningful administrative appeals process.

CONCLUSIONS OF LAW

1. As a matter of due process, this Office implicitly has the right to obtain all information in RAM's possession that is part of the record of a case or that was relied on by RAM in making its determination on an application.

2. Calling the RAM staff members as witnesses was fully authorized by the appeals regulations and the Appeals Officer's duty to develop a complete record.

3. This Office did not abuse its discretion by inquiring about RAM policies and procedures at the hearing.

4. Conclusion of Law #1 is not in error.

5. A legislative rule is valid and has the force of law only if it has been promulgated through proper rulemaking procedures.

6. The APA rulemaking procedures were not followed and, therefore, RAM's waiver requirement was not a valid or enforceable legislative rule.

7. When an agency wants its policy to be binding on all applicants without exception, and without considering an individual applicant's circumstances, it must adopt that policy as a regulation.

8. When an agency applies its policy in a particular case, it must be prepared to justify the policy as if it had never been announced.

9. Because RAM's waiver policy was not adopted as part of a regulation, RAM cannot apply the policy blindly to all applicants.

10. When an applicant challenges the waiver policy, RAM must consider the relevant facts of the individual's case and determine whether application of the policy is rational and must justify it in that instance. The failure to do so results in an arbitrary application of the policy and constitutes an abuse of discretion.

11. The stated rationale for RAM's policy of requiring waivers could not rationally apply to Mr. Van Sky's application.

12. RAM's refusal to issue QS and an IFQ permit to Mr. Van Sky until he executed the waiver was an abuse of discretion and was not authorized by the regulation that allowed RAM to require applicants to complete their QS applications.

13. Conclusion of Law #2 is not erroneous

14. The Office of Administrative Appeals may review RAM's implementation policy decisions.

DISPOSITION AND ORDER

The Decision in this appeal is AFFIRMED, except insofar as the Decision failed to state the correct number of QS units initially issued to Mr. Van Sky. RAM is ORDERED to adjust Mr. Van Sky's IFQ account for regulatory area 3A for the 2000 halibut fishing season by including an additional amount equal to the IFQ he should have received in 1995 as a result of the initial issuance of 6,598 units of halibut that were awarded to him on January 31, 1995. This Decision on Reconsideration takes effect on March 29, 2000, unless by that date the Regional Administrator orders review of the Decision.

Edward H. Hein

Chief Appeals Officer